IN THE COURT OF APPEALS OF IOWA

No. 1-602 / 90-1883

FILED
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CLERK SUPREME COURT

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STATE OF IOWA,

Appellee,

vs.

KEITH CHRISTOPHER WALKER,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Robert J. Curnan, Judge.

Walker appeals from his conviction, following a jury trial, for first-degree murder. **AFFIRMED.**

C. J. May III of Reynolds & Kenline, Dubuque, for appellant.

Bonnie J. Campbell, Attorney General; Amy M. Anderson, Assistant Attorney General; Thomas J. Ferguson, County Attorney; and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

On the evening of March 11, 1990, Jeffrey Wood and his fiancee, Andrea Hurley, were out for a stroll in their Waterloo neighborhood. The two, both in their twenties, were to be married the next month. At the same time that Jeffrey and Andrea were enjoying each other's company on their walk, seven young men in a car were riding through the neighborhood looking for someone, anyone, to shoot. One of the men had just stolen a gun that morning and was apparently quite anxious to shoot someone with it. As the young men drove through the neighborhood, they passed the gun around and talked about using it. One of the men, Maurice Claybon, expressed that he thought he might like to shoot someone in the head. Another said he wanted to shoot someone in the chest. Keith Walker, the defendant, said he just wanted to shoot someone.

As Jeffrey and Andrea were returning to Andrea's home, the occupants of the car spotted them. The men discussed beating and robbing the couple, and Walker speculated that Jeffrey had some money because he was "with his girl." Accordingly, Claybon stopped the car, Walker exclaimed "let's get wild, let's get stupid", and the group ran after the couple.

Five of the seven approached Jeffrey from behind, and Walker shoved him into a dark back yard, while Jeffrey offered no resistence nor engaged in any threatening conduct. As Jeffrey stood with his hands up and open

"asking for an explanation", Walker continued to push him yelling "come on, come on," in an attempt to entice Jeffrey into a fight. At that point, another member of the group, Maurice Claybon, simply pulled the gun out and shot Jeffrey. Jeffrey died of a gunshot wound to the heart.

Walker, together with the four other men, was charged by trial information with first-degree murder arising out of the shooting death of Jeffrey Wood. The State claimed the defendants murdered Jeffrey Wood while participating in a forcible felony (willful injury or robbery) or that they had murdered Wood willfully, deliberately, and with premeditation.

Following presentation of the State's evidence, Walker sought a directed verdict on the felony murder charge, but his motion was denied. In the instructions, the court gave the jury two alternative theories on which they could find first-degree murder: felony murder and premeditated murder. The court also instructed the jury that their verdict must be unanimous, but that they need not be unanimous on the theory underlying the verdict. The district court refused to give an instruction on the intoxication defense.

The jury found Walker guilty on the charge of first-degree murder. He now appeals the resultant conviction and asserts five arguments for reversal. Finding no merit in Walker's arguments, we affirm.

Our scope of review is for the corrections of errors at law. Iowa R. App. P. 4.[1] As a preliminary matter, we deem Walker's third argument to be waived for failure to cite any supporting authority, see Iowa R. App. P. 14(a)(3), and for failure to preserve error, State v. Pletka, 310 N.W.2d 525, 528 (Iowa 1981); Iowa R. Cr. P. 18(7)(f).

I. **Element of Malice.** Next, we address Walker's contention the trial court erred in denying his motion to dismiss. Walker asserts that due process requires "direct proof" of malice. He contends that application of the felony-murder rule, based upon the underlying felonies of willful injury or robbery, relieves the State of its burden of proving the element of malice by direct evidence. The requirement that the State prove malice is thwarted, Walker claims, through the use of a permissive inference instruction allowing the jury to draw the inference of malice from the fact that a felony, which resulted in

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1. We remind appellant's counsel that Iowa Rule of Appellate Procedure 14(a)(5) provides:

> Each division of the argument shall begin with a discussion, citing relevant authority, concerning the scope or standard of appellate review (e.g., "on error," "abuse of discretion," "de novo") and shall state how the issue was preserved for review, with references to the places in the record where the issue was raised and decided.

We also remind appellant's counsel to support statements of fact by appropriate references to the appendix or record. See Iowa R. App. P. 14(a)(4)(5) and (g). We strongly encourage counsel to comply with the appellate rules in the future. This court may impose sanctions (e.g., deeming arguments to be waived) for such failures.

death, was committed. As such, he argues the felony-murder statute and the permissive inference of malice instruction, when combined, deprived him of his due process protections.

We find Walker's argument without merit. In State v. Ragland, the Iowa Supreme Court restated that the crime of willful injury may serve as the basis for application of the felony murder statute. 420 N.W.2d 791, 793 (Iowa 1988); see also State v. Phams, 342 N.W.2d 792, 795 (Iowa 1983), and State v. Beeman, 315 N.W.2d 770, 777 (Iowa 1982). There is no question but that the crime of robbery may also serve as such a basis. See State v. Galloway, 275 N.W.2d 736, 738 (Iowa 1979). Furthermore, it is well settled that malice may be inferred from the commission of a felony that results in death. See State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980). We do not believe these instructions, proper when given individually, denied Walker due process of law when given in concert. See State v. Oliver, 341 N.W.2d 744, 747 (Iowa 1983).

II. **Independent Felony & Sufficiency of Evidence.** As his second assignment of error, Walker seems to argue the court erred in submitting the felony murder instruction because the State failed to introduce evidence that Claybon committed a forcible felony independent of the murder. He states "the murder and felony, if they occurred, occurred in one transaction." In State v. Beeman, the supreme court declined to adopt an independent felony rule for felony murder based upon felonious assault, 315 N.W.2d at 776 n.9,

and we find no support for Walker's position in subsequent cases. The record contains ample evidence of Claybon and Walker's participation in the offense of willful injury.

III. Intoxication Defense. Third, Walker argues the trial court erred in refusing to submit his requested instruction on the defense of intoxication. We disagree. It is well established that the trial court need not submit an instruction which is unsupported by substantial evidence. State v. Wagner, 410 N.W.2d 207, 214 (Iowa 1987). Substantial evidence means that which "a reasonable mind would accept . . . as adequate to reach a conclusion." State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). More than a mere scintilla is necessary. Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa 1986). The evidence is to be considered in the light most favorable to the defendant. State v. Tomlinson, 243 N.W.2d 551, 553 (Iowa 1976).

We do not believe the trial court erred in refusing to submit the instruction. Taken in the light most favorable to Walker, the record establishes only that Walker shared a pint of wine with two other people and possessed a quart of beer, intending to drink it. We do not believe the record contains substantial evidence tending to support Walker's contention that he was too intoxicated to have formulated the requisite intent.

IV. Unanimity of Verdict. As his last assignment of error, Walker contends the trial court erred by instructing

the jury it could find defendant guilty without unanimously agreeing on a single theory of first degree murder. In support of his argument, Walker cites only Iowa Rule of Criminal Procedure 21(5).

The jury was properly instructed. See State v. Draper, 457 N.W.2d 606, 609 (Iowa 1990)(jury need not be unanimous as to the mode of commission of the crime as long as it was unanimous as to the commission of the crime).

The costs of this appeal are taxed to Keith Walker.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.